

PD-0207-18
In the Court of Criminal Appeals of Texas
At Austin

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No. 01-16-00434-CR
In the Court of Appeals
For the First District of Texas
At Houston

◆

No. 1472750
In the 338th District Court
Of Harris County, Texas

◆

Damon Orlando Milton
Appellant

v.

The State of Texas
Appellee

◆

State's Brief on Discretionary Review

◆

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“Lion tries to eat baby PART 1”

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Statement of the Case

The appellant was indicted for robbery. (CR 11). The indictment alleged two prior felony convictions, one for an offense committed after the other conviction became final. (CR 11). The appellant pleaded not guilty but a jury found him guilty as charged. (CR 58). The jury found both enhancement paragraphs true and assessed punishment at fifty years' confinement. (CR 68, 74). The trial court certified the appellant's right of appeal and the appellant filed a notice of appeal. (CR 77, 79).

On direct appeal a unanimous panel of the First Court of Appeals affirmed the appellant's conviction and sentence. *Milton v. State*, No. 01-16-00434-CR, 2017 WL 3633570 (Tex. App.—Houston [1st Dist.] Aug. 24, 2017, pet. granted) (mem. op. not designated for publication). The appellant filed a motion for *en banc* reconsideration, which was denied with two justices dissenting. *Milton v. State*, 546 S.W.3d 330, 330, 340 (Tex. App.—Houston [1st Dist.] 2018, pet. granted) (Jennings, J., and Bland, J., dissenting to denial of *en banc* reconsideration). This Court granted discretionary review.

Ground for Review

Did the Court of Appeals [err] in holding the trial court did not abuse its discretion in allowing the State to play a video of a lion attempting to maul an infant during its closing arguments?

Statement of Facts

LaSondra Robertson was a cashier at a CVS store. (4 RR 16-18). On June 21, 2015, the appellant placed some merchandise on the counter in front of Robertson and told her to give him everything in the register. (4 RR 60, 65). The appellant said he had a weapon. (4 RR 60). However, the appellant walked away before he could complete the theft. (4 RR 65).

The next day the appellant returned to the same CVS, placed some items in front of Robertson's register, and told her to give him everything in the register or else he would kill her. (4 RR 19-20, 26). He again said he had a weapon. (4 RR 20). Robertson gave him the money from the cash register. (4 RR 20-21). The appellant went to the beverage aisle and took four beers, some candy, and some chips. (4 RR 35). He then ran from the store. (4 RR 28).

Robertson reported the robbery to the manager, who called the police. (4 RR 28, 114). Houston Police Officer Austin Huckabee

found the appellant about one third of a mile away, walking away from the CVS store. (4 RR 117). The appellant matched the description provided by Robertson. (4 RR 118). Huckabee conducted a pat-down for weapons, and found a large wad of cash in the appellant's pocket. (4 RR 120-121). The appellant had a backpack containing plastic CVS shopping bags with cold beer, snacks, and loose change. (4 RR 121, 128). At this trial, for the second robbery, Robertson identified the appellant as the robber. (4 RR 28-29).

Ground for Review

Did the Court of Appeals [err] in holding the trial court did not abuse its discretion in allowing the State to play a video of a lion attempting to maul an infant during its closing arguments?

On direct appeal the appellant raised six points of error. The only one he has presented to this Court relates to the State's use of a YouTube clip during its punishment-phase jury argument.

I. Factual Background

A. The prosecutor played a video during the punishment-phase jury argument to illustrate his point that the appellant's desire to commit crime would be irrelevant if the appellant was in prison.

At the punishment phase, the State's evidence showed that the appellant had six prior convictions: Two for robbery, one for felony theft from a person (which had been reduced from aggravated robbery), one for felony evading arrest, one for the misdemeanor of attempted unauthorized use of a motor vehicle, and one for forgery. (State's Exs. 22-27). The defense put on the appellant's sister who said that the jury should consider that the appellant had a 12-year-old son, and elderly parents who needed help. (5 RR 45).

Prior to jury arguments, the prosecutor advised the trial court that he planned "to play a video as a demonstrative at the very beginning of [his] closing." (5 RR 55). Defense counsel, who had seen the video before the conference, described it: "[I]t is ... a lion that is behind a glass, and there's a baby in front of him on the other side of the glass, and the lion is vigorously trying to get to and attack the baby....I didn't hear the audio. But I've been informed that the parents are laughing, or whoever is taking the video is laughing." (5 RR 55).

Defense counsel said she did not know what the prosecutor intended to do with the video, but objected to playing it on two bases: 1) “[I]t just has no relevance to this case...”; and 2) “I believe that it’s highly [prejudicial] because it pulls on the heart strings of the jury in a situation where we don’t need it. This is not a situation where children are in harm’s way.” (5 RR 55-56).

The prosecutor replied that the video was not “drastic or terror evoking,” but was actually “comical. There’s people laughing light-heartily about his lion trying to get to a baby behind a glass wall at the zoo.” (5 RR 56). The prosecutor said he would not compare the defendant to the lion or society to the baby, but was going to use the video to talk about “behavior and the opportunity to act in certain ways.” (5 RR 56).

The trial court asked the prosecutor to be more specific. The prosecutor said that he would use the video to illustrate that “if you’re not given the opportunity to act certain ways, then your desires don’t matter. Because the lion has no opportunity to hurt the baby, it doesn’t matter what his desires are.” (5 RR 57). The trial court overruled the defense objection. (5 RR 57).

The prosecutor kept his opening argument brief, using it to focus the jury on the punishment range of 25 to life. (5 RR 61-62). The defense argument began by describing the appellant's offense as "a theft with a lie." (5 RR 62). Defense counsel argued that the appellant had no weapon during the robbery and, on the surveillance video, did not look serious about his threat to harm the cashier. (5 RR 63-64). Defense counsel minimized the appellant's prior convictions and informed the jury that it could find the enhancement allegations not true, which would reduce the punishment range to 2-20. (5 RR 65-67). Defense counsel concluded her argument by pointing out that the appellant had a family, and while he "messed up" by committing the robbery, no one was hurt. (5 RR 67).

The prosecutor began his closing argument by playing the video.¹ (5 RR 68). The record is silent to how the video was received. The prosecutor began his argument: "Ladies and gentlemen, I know you're thinking, that was weird, what was that about?" (5 RR 68). The prosecutor stated that the video "is exactly what this punishment phase is about." (5 RR 68). The prosecutor said that he believed "human

¹ The appellant's motion for new trial included both a copy of the video on a CD as well as a link to the video on YouTube: <https://www.YouTube.com/watch?v=6fbahS7VSFs> ("Lion tries to eat baby PART 1"). (Supp. CR 4).

behavior is motive, plus opportunity.” (5 RR 69). The video was funny, he said, because the “motive of that lion is never changing,” but because the lion was behind the glass it had no opportunity to eat the baby. (5 RR 69, 70). Remove the glass, he said, and “it’s no longer funny, it’s a tragedy....That’s what [is] going on with this case.”

The prosecutor recounted the appellant’s criminal history, noting that every time he had been given another chance, he had found another victim: “You’re never going to change [the appellant’s] motive.” (5 RR 70-71). The prosecutor then tried to tie these themes together:

In a vacuum, that resume right there, a sterile courtroom, it’s almost laughable because we know he’s such a bad guy. It’s almost laughable, just like that lion. You’re laughing at that lion because he’s behind that piece of glass. Nothing funny about that lion when he’s outside that piece of glass, that’s a tragedy. Nothing funny when Damon Milton is outside of prison, that’s a tragedy. That’s what I mean I said that video has everything to do with this case, because he’s never changing his motive.

(5 RR 71-72).

The prosecutor argued that people like the appellant are why people like the jurors have to lock their doors at night. (5 RR 72-73). The prosecutor concluded by telling the jurors that he was envious of their position because, through their punishment verdict in this case,

they got to make a statement to the community about their dislike of crime. (5 RR 73-74). The prosecutor did not ask for a specific sentence, but said only that the appellant “doesn’t deserve less than 40.” (5 RR 74). After a little less than two hours, the jury returned with a verdict of 50 years. (5 RR 76; CR 118).

B. The appellant complained about the video in his motion for new trial. The trial court denied the motion.

The appellant filed a motion for new trial alleging that the trial court erred in allowing the State to play the lion video, and also alleging ineffective assistance during the guilt phase. (Supp. CR 3-5). Regarding the video, the motion cited to a case dealing with erroneous admission of evidence. (*See* Supp. CR 4 (citing *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003))). The motion complained that

[t]he video was not admitted into evidence during the trial; was not relevant as it is not a video of anything associated with the alleged offense or evidence in the case; was not admitted during the trial for demonstrative purposes in assisting a witness testify; and portrayed images that were highly prejudicial and inflammatory.

(Supp. CR 4). The motion concluded by arguing that the video affected the appellant’s substantial rights because it “was used to

compare the Defendant as the lion and individuals as the infant....” (Supp. CR 4). The appellant submitted a copy of the video as evidence, as well as a link to the video on YouTube. (*See* Def.’s Ex. 2; Supp. CR 4).

The motion was heard by a different judge then tried the case. (*See* 5 RR 1; 1 Supp. RR 1). Defense counsel characterized the State’s trial argument as being that “the lion was [the appellant] and the infant was society and the only way they could protect society from the defendant was to not let him have access....” (1 Supp. RR 9). The prosecutor disputed this. (1 Supp. RR 12). He said that during argument there was a board for the jury to see that read “Behavior and motive equals action,” and the point of the video was to show that “if you lack either motive or behavior, you can’t take action.”² (1 Supp. RR 12). The prosecutor described defense counsel’s characterization of his trial argument as “inaccurate, and ... disingenuous.”³ (1 Supp. RR 13).

² As this statement borders on nonsense, it appears the prosecutor misspoke here. In his argument at trial the prosecutor had made the equation “motive, plus opportunity, and that equals behavior.” (5 RR 69). Nothing else in the transcript reflects what was on the board, but it would have been peculiar if the board did not match the prosecutor’s repeated phrasing.

³ The appellant had different counsel at the motion for new trial hearing than at trial. The appellant’s appellate counsel was relying on what trial counsel had told

The prosecutor then argued that the use of the video was appropriate because it was merely a visual aid, thus it did not have to be part of the evidence. (1 Supp. RR 14-15). The Court asked the parties to submit any additional case law regarding the use of the visual aids during jury argument, and then recessed. (1 Supp. RR 15-16). The record does not reflect any additional action, so it seems that the motion for new trial was overruled by operation of law. (*See* Supp. CR 19).

C. On appeal, the appellant treated the video as improperly admitted evidence. The State replied that the video was not evidence but was merely a visual aid.

On direct appeal, the appellant's first point of error challenged the State's use of the video during jury argument: "The trial court abused its discretion in allowing the State to play a video, not admitted into evidence or admitted for demonstrative purposes during the trial, during its closing argument in the punishment phase of trial." (Appellant's Brief on Direct Appeal at 7). The appellant's argument treated this as an evidentiary matter, arguing that, under Rule of

her. (1 Supp. RR 9; Supp. CR 8 (affidavit from trial counsel characterizing State's argument)). The trial transcript was not ready by the time of the hearing on the motion for new trial. (1 Supp. RR 12).

Evidence 401, the video was irrelevant, and under Rule of Evidence 403 the video was inadmissible because the probative value was substantially outweighed by its prejudicial effect. (*Id.* at 9-10).

To show the prejudicial effect for his Rule 403-analysis, the appellant argued that, “[d]espite the prosecutor’s assurance to the trial court that he was not going to equate the lion to Appellant and the infant to society, [the prosecutor] did exactly that.” (*Id.* at 11). The appellant argued that the video was distracting from the relevant issue. (*Id.* at 12).

The appellant also argued that video “had a large tendency to be given undue weight by the jury that was not equipped to evaluate the probative force of the video.” (*Ibid.*). This was so because “the jury did not have any tools to assist it in evaluating the video,” such as a limiting instruction. (*Id.* at 12-13). Finally, the appellant argued that the video was “repetitive of the State’s argument,” which was adequately made in other ways. (*Id.* at 13).

In its brief, the State argued that the appellant was arguing under the wrong standard. (State’s Brief on Direct Appeal at 54). The State argued that because “the video was not admitted as evidence at trial, the rules of evidence do not apply.” (*Id.* at 55). Instead, the State

argued, “we must turn to the rules regarding proper jury argument and the use of visual aids in jury argument.” (*Ibid.*).

The State pointed to case law holding that prosecutors may use colorful speech and analogies in jury arguments. (*Id.* at 56 (citing *Rocha v. State*, 16 S.W.3d 1, 22 (Tex. Crim. App. 2000), *Broussard v. State*, 910 S.W.2d 952, 959 (Tex. Crim. App. 1995), and *Burns v. State*, 556 S.W.2d 270, 285 (Tex. Crim. App. 1977))). The State also pointed to cases allowing the use of visual aids to summarize the evidence during jury argument. (*Ibid.* (citing *Jarnigan v. State*, 57 S.W.3d 76, 92 (Tex. App.—Houston [14th Dist. 2001, pet. ref’d) and *Glover v. State*, No. 05-02-00862-CR, 2003 WL 21508491, at *6 (Tex. App.—Dallas July 2, 2003, pet. ref’d) (mem. op. not designated for publication))).

The State argued that the video clip “was summarizing the evidence and making a plea for law enforcement. The short video clip was a visual aid depicting the State’s analogy that the appellant would continue to commit crimes unless he was locked up.” (*Id.* at 57). The State also argued that the video was a response to defense counsel’s argument; the defense argued that the appellant should receive a short sentence because he would be loved by family members after he got out, but, as shown by the appellant’s record and illustrated by the

video, the State believed the appellant would commit crimes again as soon as he had the opportunity. (*Id.* at 57-58).

Interestingly, the State pointed out that in an earlier case the First Court had found that a prosecutor's discussion of the same video clip was not error. (*Id.* at 58 (citing *Thompson v. State*, No. 01-14-00862-CR, 2015 WL 9241691, at *3 (Tex. App.—Houston [1st Dist] Dec. 17, 2015, no pet.) (mem. op not designated for publication))). In that case the prosecutor did not actually play the clip.

D. The First Court ignored or rejected both parties' approaches and addressed the issue as a claim of improper jury argument.

The First Court began its discussion of this point by quoting case law related to proper jury argument. *Milton v. State*, No. 01-16-00434-CR, 2017 WL 3633570, at *12-13 (Tex. App.—Houston [1st Dist.] August 24, 2017, pet. granted) (mem. op not designated for publication). The First Court then characterized the State's jury argument in this case as "intimating that keeping appellant confined in prison protected society just as the glass wall protected the child from the lion." *Id.* at *13.

The First Court briefly summarized the parties' arguments then discussed *Thompson*. *Thompson* was a murder case. There, the State

used its punishment-phase jury argument to discuss the same YouTube clip at issue here:

I don't know if any of you saw that[;] it was in a video back on CNN ... where it was a mother, who had her little baby, and she was holding — she was at the zoo — and she [was] holding this baby near the lion cage. And there was a clear plastic barrier between the baby and the lion, and the baby is sitting there dancing, moving around, and the lion comes out. It's gnawing right there. Everybody thinks, oh, it's hilarious. It's cut. It's so great mom's filming it, sends it to CNN, everybody watches it. But was that really cute? What would have happened if the glass barrier was not there? That baby is a goner. Because the motivation of a lion, a lion is a killer. A lion is a predator. That lion would have eaten that baby and nothing would have changed.

The defendant is a killer. He is a predator.

Id. at *13-14 (quoting *Thompson*, 2015 WL 9241691, at *3). The First Court held in *Thompson* that, in the context of the case, analogizing the defendant to a lion who should remain in a cage was a proper plea for law enforcement. *Id.* at *14.

After discussing *Thompson*, the First Court returned to the case at hand and stated — without reason or citation — that

We reject the State's argument that the video represented a visual aid in the summation of the evidence. Thus, we are presented with the question: Was the video within the permissible bounds of responding to appellant's arguments or making a plea for law enforcement?

Ibid.

The First Court pointed out that, while it had upheld the State's argument in *Thompson*, other cases have rejected comparisons of defendants to animals. *Ibid.* "Whether such a reference is appropriate is determined on a case-by-case basis dependent upon context." *Ibid.*

The First Court held that the "analogy between the glass being necessary to restrain the lion and jail being necessary to restrain appellant was a plea for law enforcement and protection of the community in light of the sheer volume of appellant's prior offenses." *Ibid.* However, the First Court believed that the appropriateness of this analogy was "tenuous" because other cases where courts had approved of comparing defendants to predatory animals "were cases involving murder or other violent behavior."⁴ Still, given the "entire context" of the case, including, specifically, the appellant's lengthy record and the fact that "appellant's attorney had ... pleaded for a lower sentence to give appellant another chance in society," the First Court held the animal analogy was appropriate in this case and overruled the appellant's point.

⁴ The First Court's apparent belief that robbery was not "violent behavior" is noteworthy.

E. The appellant filed a motion for *en banc* reconsideration, pointing out that the panel had not addressed his point. The First Court denied the motion, with two justices dissenting, only one of whom addressed the appellant's point.

The appellant filed virtually identical motions for rehearing and *en banc* reconsideration pointing out that his complaint was not about the State's jury argument but about the State playing the video. (Motion for *en banc* Reconsideration at 2). The appellant also argued that the panel was incorrect to conclude that the video was a response to defense counsel's argument, because the trial court's ruling about the video occurred prior to the defense's argument. (*Id.* at 8).

The First Court denied the appellant's motions, with two justices who were not on the panel issuing published dissents from denial of *en banc* reconsideration. *Milton v. State*, 546 S.W.3d 330 (Tex. App.—Houston [1st Dist.] 2018, pet. granted) (ops. of Jennings, J., and Bland, J., dissenting). Justice Jennings issued a lengthy dissent that, like the panel opinion, addressed the issue as one of improper jury argument. *Milton*, 546 S.W.3d at 333-34. After reviewing case law that deals with prosecutors comparing defendants to animals, Justice Jennings concluded that the panel erred in its reasoning because cases that upheld such analogies “involve seriously violent criminal

offenses,” but this case was “not ... a gruesome or incredibly violent criminal offense.” *Id.* at 335-36. As such, Justice Jennings concluded that “[t]he State’s comparison of appellant to a violent, predatory animal seeking to attack a defenseless baby was prejudicial, did not advance a legitimate purpose in this case, and was designed to arouse the passion and prejudices of the jury.” *Id.* at 339.

Justice Bland’s dissenting opinion addressed the appellant’s point and concluded that it was error for the trial court to allow the State to play a video that was not in evidence. *Id.* at 340-41. Citing to this Court’s opinion in *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000), Justice Bland concluded that allowing the State to play the video was improper because it introduced to the jury facts that were not in evidence. *Id.* at 341. Justice Bland believed the error was harmful because the State played the video as “a calculated effort to increase the punishment level in this case.” *Ibid.*

II. Legal Background

A. The proscription on unadmitted evidence during argument is not nearly as strict as it sometimes sounds.

The appellant’s claim is about the use of unadmitted evidence during the State’s jury argument. Many cases state, in blanket terms,

that any reference during argument to a fact not in evidence is forbidden. *See, e.g.,* *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973) (“It is the duty of trial counsel to confine their arguments to the record; reference to facts that are neither in evidence nor inferable from the evidence is therefore improper.”); *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008) (“error exists when facts not supported by the record are interjected in the argument....”); *Freeman v. State*, 340 S.W.3d 717, 728 (Tex. Crim. App. 2011)(“A prosecutor may not use closing arguments to present evidence that is outside the record.”).

The categorical nature of these declarations notwithstanding, the case law shows that there are important and regular exceptions to this supposed rule. The first is what is known as the “common knowledge” exception:

[A]n argument, although outside the record, may be based upon matters of common knowledge. *Salinas v. State*, [542 S.W.2d 864 (Tex. Crim. App. 1976)] (fact that being an informer is a hazardous profession); *Ramirez v. State*, [293 S.W.2d 653 (Tex. Crim. App. 1956)] (fact that some marihuana finds its way into the possession of high school children); *Banks v. State*, [230 S.W. 994 (Tex. Crim. App. 1921)] (fact that whiskey is an intoxicating liquor); *Borrer v. State*, 204 S.W. 1003 (Tex. Crim. App. 1918)] (fact that a bullet is deflected from a straight course by striking an object).

Carter v. State, 614 S.W.2d 821, 822–23 (Tex. Crim. App. 1981). In *Carter*, the issue was whether it was proper for the prosecutor to point out to the jury that a deceased victim’s mother did not get to spend Christmas with the deceased victim the prior year. There had been no evidence that the victim had a mother, or that Christmas had occurred. This Court held that the prosecutor’s statements were permissible because they were common knowledge. *Id.* at 823.

The common knowledge exception seems to be alive to this day. *See, e.g., Nenno v. State*, 970 S.W.2d 549, 559 (Tex. Crim. App. 1998) (overruled on other grounds by *State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999) (common knowledge exception permitted prosecutor to state “you don’t die quickly from your oxygen being cut off”); *Temple v. State*, 342 S.W.3d 572, 608 (Tex. App.—Houston [14th Dist.] 2010), *aff’d* 390 S.W.3d 341 (Tex. Crim. App. 2013) (common knowledge exception permitted prosecutor to state (1) persons commit burglaries to steal; (2) burglars act quickly so they do not “get caught”; and (3) burglars “take everything they possibly can that’s valuable”); *Orr v. State*, No. 13-09-515-CR, 2011 WL 5598363, at *2 (Tex. App.—Corpus Christi Nov. 17, 2011, pet. ref’d) (mem. op. not

designated for publication) (where evidence showed that defendant had swastika tattoo but there was no evidence defendant was a Nazi, prosecutor allowed to argue that perhaps defendant was a Nazi because it is common knowledge that “[t]he swastika is the recognized emblem used by the Nazis.”).

Closely related to the “common knowledge” exception is the allowance for analogies in closing arguments. A good example of how argument by analogy necessarily brings in facts outside the record can be found in *Broussard v. State*, 910 S.W.2d 952 (Tex. Crim. App. 1995).

During closing argument at the punishment phase, the State sought to illustrate that defense witness testimony drew an incomplete picture of appellant's personality. After opening with the story of Pompeii, the prosecutor compared accounts of appellant's peaceful disposition to periods of volcanic dormancy:

PROSECUTOR: And now all his friends get up here and say he's dormant. They paint a pretty picture—

DEFENSE COUNSEL: Objection, Your Honor. He's arguing outside the record.

COURT: Overruled, sir.

PROSECUTOR: They paint a pretty picture of Mr. Broussard that is not the case. They obviously are not seeing the dark side of this man, the side that you

all saw in the evidence that was presented the last time he erupted.

Will he erupt again? Yes. When will he erupt again?

Broussard, 910 S.W.2d at 959. This Court held that the trial court was correct to overrule the objection:

In comparing appellant to a volcano, the prosecutor merely used an analogy to emphasize and explain evidence. That evidence supported a conclusion that while appellant might behave peaceably at times, he also had a great propensity for violence.

Ibid.

All of that is true, but it elides over the amount of outside-the-record evidence the prosecutor introduced: The story of Pompeii, the fact that volcanos lay dormant, the fact that volcanoes will erupt after periods of dormancy, the fact that volcanic eruptions are destructive. Those facts would surely fall within the common knowledge exception, but that's how analogies work: by comparing one set of facts to a different, facially unrelated set of facts.

Prosecutors regularly use analogies to say harsh things about defendants, and a body of case law has developed around this practice. As *Broussard* illustrates, appellate rulings that approve of these arguments ignore the fact that they necessarily introduce evidence

from outside the record. The opinions focus instead on whether the non-record evidence relates to the evidence at trial. This is particularly true for the line of cases holding it proper to compare defendants to animals if the facts of the offense warrant it. *See also Ponce v. State*, 89 S.W.3d 110, 121 (Tex. App.—Corpus Christi 2002, no pet.) (where prosecutor “referred to defendant as a ‘wolf’ as part of an overall theme that [defendant] stalked the victim as a wolf would stalk its prey,” argument was “proper deduction based upon the evidence”; no mention of whether record contained evidence of how wolves stalk prey); *Burns v. State*, 556 S.W.2d 270, 285 (Tex. Crim. App. 1977) (where prosecutor referred to defendant as “animal,” argument was proper because record reflected “bestial aspect” of defendant’s crime; no mention of whether record contained evidence regarding animal behavior).

Appellate courts disapprove of these sorts of harsh analogies when they do not accurately match up to the facts of the case. Only then does it seem to become noteworthy that the analogy introduced facts not in evidence. *See, e.g., Brown v. State*, 978 S.W.2d 708, 714 (Tex. App.—Amarillo 1998, pet. ref’d) (where prosecutor compared kidnapping defendant to Jeffrey Dahmer, John Wayne Gacy, and Ted

Bundy, argument was improper because it did not relate to facts of case, and because it introduced facts not in evidence).

Because the use of analogies is so common in law, most of them will pass without objection or note. *See Hawkins v. State*, 135 S.W.3d 72, 86 (Tex. Crim. App. 2004) (Womack, J., concurring) (noting that efforts by appellate courts to create prescriptive lists of acceptable jury arguments necessarily fail because appellate courts address only arguments that are complained of). For instance, in this case the trial prosecutor, without objection, analogized the appellant's desire to commit crime to his own desire to eat at Chik-Fil-A. (5 RR 69). The prosecutor pointed out that just as the glass in the video checked the lion's desire to eat the baby, and prison would check the appellant's desire to commit crime, so too Chik-Fil-A being closed checked his desire to eat there on Sundays. There is no evidence in the record regarding Chik-Fil-A being closed on Sundays.

B. The use of visual aids seems to be a matter left to the trial court's discretion.

There is little authority in the case law regarding the use of visual aids in the courtroom. That is probably because visual aids, in various forms, are common and the general propriety of their use is

unquestioned. For instance, the record in this case seems to show that at least one party used a PowerPoint presentation during voir dire (3 RR 100-01), an interactive projector screen was used during trial (4 RR 116-17), and during the guilt-phase jury argument the prosecutor used the length of the jury box and court room to illustrate the strength of the State's evidence. (4 RR 178 ("Ladies and gentlemen, this corner of the jury box represents no evidence. And right here represents beyond a reasonable doubt. This case is outside in the hall. We have so much evidence...")). None of these attracted any adverse attention in the trial court or on appeal.

The limited case law on the subject seems to indicate that, so long as the argument or fact the visual aid illustrates is proper, the parties' use of visual aids is entirely within the trial court's discretion. *See Jarnigan v. State*, 57 S.W.3d 76, 92 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) ("It is well established that the trial court has the discretion to permit the use of visual aids and charts in the summarizing of evidence."); *Henricks v. State*, 293 S.W.3d 267, 276 (Tex. App.—Eastland 2009, pet. ref'd)(trial court did not abuse discretion by overruling defense objection to State's witness using non-evidentiary PowerPoint presentation as visual aid for testimony about

bloodstains); *Glover v. State*, No. 05-02-00862-CR, 2003 WL 21508491, at *6 (Tex. App.—Dallas July 2, 2003, pet. ref'd) (mem. op. not designated for publication) (trial court did not abuse discretion in overruling defense objection to State's use of sign reading "[Appellant] is guilty" during jury argument). Presumably a trial court would be within its discretion to completely disallow the practice.

III. Argument

A. The First Court addressed an objection that wasn't raised, and an argument that wasn't made.

At trial the appellant objected to the playing of the video. (4 RR 55-56). The appellant did *not* object to the State's argument on the subject. (*See* 4 RR 55, (defense counsel: "I don't know what [the video is] supposed to be used for exactly. And I'm not trying to get into the State's surprise argument....") 68-74 (State's jury argument where defense counsel does not object to any argument related to the video)).

In making its proffer, the prosecutor described the video as "comical." (4 RR 56). The prosecutor specifically stated he would not "compare the defendant to the lion, or society to the baby." (4 RR 56). The prosecutor then outlined the argument he intended to make,

which, indeed, did not compare the defendant to a lion or society of the baby. (4 RR 57).

The First Court summarized the appellant's point: "Appellant argues that the use of the video to compare the prospect of appellant's presence outside of prison to that of a lion that would be mauling an infant was inflammatory and suggested to the jury an improper basis for determining appellant's punishment." *Milton*, 2017 WL 3633570, at*13. The First Court then analyzed this case by comparing it to a case where the State actually *had* argued that the defendant was like a lion that would eat a baby if not caged. *Id.* (discussing *Thompson v. State*, No. 01-14-00862-CR, 2015 WL 9241691, at *3 (Tex. App.—Houston [1st Dist] Dec. 17, 2015, no pet.) (mem. op not designated for publication)). The First Court's holding was that it was acceptable in this case to argue that the appellant was a vicious lion trying to eat a baby and the jury needed to stop him.

While the State will ask this Court to affirm the First Court's judgment, the First Court's analysis misses the mark.

B. On the merits, the trial court did not abuse its discretion in allowing the State to play a comical video to illustrate its rhetorical point.

The relevant question is: Did the trial err by overruling the objection that was made to the video that was proffered? The State believes it did not.

Whether this Court views the matter as an objection to improper argument, or an objection to the use of a visual aid, the trial court's ruling is reviewed for an abuse of discretion. *See Davis v. State*, 329 S.W.3d 798, 825 (Tex. Crim. App. 2010); *Markey v. State*, 996 S.W.2d 226, 231 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Under that standard, appellate court considers only what was before the trial court at the time it made the ruling. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).

The starting point for analyzing the trial court's ruling is to note that the prosecutor's proffered argument was a legitimate plea for law enforcement, which is a permissible jury argument. The prosecutor asked the jury to deny the appellant the opportunity to commit crime by giving him a lengthy prison sentence. The State's argument that the defendant had a constant desire to commit crime and would continue

committing crime so long as he wasn't in prison was a reasonable deduction from the appellant's lengthy criminal history.

Given that the argument was legitimate, was it legitimate to allow the State to use a demonstrative visual aid to help with its rhetorical point? On this point the appellant's main argument seems to be that it was improper to play the video because it was not admitted as evidence. (Appellant's Brief at 10-11). This was the basis for Justice Bland's dissenting opinion on denial of *en banc* reconsideration.

However, the entire point of demonstratives and visual aids is that they are not evidence; if the evidence could serve the same purpose as a visual aid then there would be no need for a visual aid. In an ordinary case it is error (thought probably harmless error) for the trial court to admit a visual aid into evidence. See *Markey*, 996 S.W.2d at 231 (where prosecutor created visual aid listing signs of defendant's intoxication described in witness testimony, trial court harmlessly erred by admitting aid into evidence because it was not relevant).

The appellant's brief quotes Justice Bland for the proposition that the "video presented facts outside the record and would never have been admitted into evidence." (Appellant's Brief at 10-11). This is surely true, but it would be true of virtually every analogy used in

closing argument. In *Broussard* this Court approved of an argument where the prosecutor discussed the Pompeii disaster and compared the defendant to a dormant volcano that would likely erupt again; those were facts outside the record that would never have been admitted into evidence. The appellant and Justice Bland are incorrect in their belief that it is impermissible to discuss facts outside the record during jury argument.

The appellant's brief, along with Justice Jennings's dissent, portrays the video clip as inflammatory. (Appellant's Brief at 10). This is just not true. On the video there is considerable laughter and it's apparent the child was never in any danger. Interacting with animals through glass walls is a well-known hobby among zoo-goers, often resulting in funny stories or videos. Characterizing this as a video of a lion trying to maul a child is equivalent to characterizing a video of Lucy pulling the football away from Charlie Brown as "Child falls down dramatically, possibly killing himself." It's technically accurate, but fails to describe the real nature of the video.

The State understands that humor is in the eye of the beholder, but this is abuse of discretion review. This Court need not find the

video funny to recognize that the trial court's determination that it was not inflammatory was within the zone of reasonable disagreement.

In assessing the propriety of jury arguments, this Court has made clear that challenges must be viewed in context. *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). The context of the video in this case was that the prosecutor did not use it in an inflammatory way. It was used as a goofy, live-action parable to illustrate the simple, non-inflammatory point that desires can be thwarted. As further proof that the video was not used in an inflammatory way, the prosecutor, with his Chik-Fil-A analogy, described himself personally as an example of someone with desires that could be thwarted.

The prosecutor's jury argument was a thoughtful, sometimes off-beat appeal to the jury's senses of community and justice. As part of this, he played a funny YouTube clip. Neither the appellant nor the First Court have cited any rule preventing a trial court from allowing that. Though the specific issue of using a YouTube clip in this manner is novel, such a practice fits in with long-standing notions of argument by analogy and the use of non-evidentiary visual aids. This Court should hold that the trial court was within its discretion to overrule the appellant's objection to the video.

Conclusion

The State asks this Court to affirm the First Court's judgment.

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